Supreme Court, U.S.
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No. 03166 0

In The

Supreme Court of the United States

KENNETH J. SCHMIER,

Petitioner,

vs.

THE SUPREME COURT OF CALIFORNIA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the California "No-Citation Rule" which was used by the California Court of Appeal as its sole authority to justify precluding counsel from citing and arguing relevant unpublished decisions of the same California Court of Appeal at oral argument or refusal of the same court to consider Petitioner's citation of relevant unpublished decisions of the same California Court of Appeal in his written briefs, violate the First and Fourteenth Amendments of the Constitution?

2. Can Rule 977 be found constitutional on the face of the complaint, as a matter of law, when the underlying courts admit the rule restricts speech, without statement of purpose or justification of the rule, proof of the efficacy of the rule to achieve any stated goals, examination of less restrictive means of achieving the intended benefits of the Rule, and without other factual determinations relevant to any level of First Amendment scrutiny?

PARTIES TO THE PROCEEDING

KENNETH J. SCHMIER, an individual, on behalf of himself and all persons similarly situated in the State of California. Kenneth J. Schmier, Attorney at Law, 1475 Powell Street, Suite 201, Emeryville, California 94608. Telephone (510) 420-3101.

THE SUPREME COURT OF CALIFORNIA, THE CALIFORNIA COURTS OF APPEAL, and the CALIFORNIA JUDICIAL COUNCIL, the judicial branch of government of the State of California. Tom Blake, Deputy Attorney General of the State of California, 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102. Telephone (415) 703-5506.

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DECISIONS BELOW

The Superior Court of California entered its Order Sustaining Demurrer on September 17, 2002, App. 1-2, and its Order Dismissing Case on November 4, 2002. App. 3-4. The Fifth Division of the California First District Court of Appeal filed its decision on December 16, 2003. App. 5-10. On March 17, 2004, following timely petition for review, the California Supreme Court denied review. App. 11.

BASIS OF SUPREME COURT JURISDICTION

On November 4, 2002, the Superior Court of California entered its judgment of dismissal. App. 3-4. The dismissal was affirmed by the California Court of Appeal on December 16, 2003. App. 5-10. Following timely Petition for Review, the California Supreme Court denied review on March 17, 2004. App. 11. Petitioner Kenneth J. Schmier seeks review of the judgment of dismissal on a writ of certiorari.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in pertinent part that, "Congress shall make no law . . . abridging the freedom of speech, . . . and to petition the government for a redress of grievances."

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part that, "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. This petition involves the constitutionality of Rule 977 of the California Rules of Court, which provides in relevant part,

> (a) [Unpublished Opinions] An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).
>
> (b) [Exceptions] Such an opinion may be cited or relied on:
>
> > (1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or
> >
> > (2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

Rule 977, California Rules of Court (West 2004).

STATEMENT OF THE CASE

A. Procedural History and Presentation of Federal Question

On January 24, 2002, Kenneth J. Schmier filed a complaint for declaratory and injunctive relief in San Francisco Superior Court against the Supreme Court of California, the California Courts of Appeal and the California Judicial Council (hereafter "the California Judiciary.") Schmier alleged that a panel of Division Five of the First District Court of Appeal violated his constitutional rights of free expression when it refused, on the basis of Rule 977, to permit him to cite and discuss relevant unpublished opinions in an oral argument on behalf of a client.

In his complaint, Schmier sought injunctive relief, nominal damages, and a declaration that Rule 977 of the California Rules of Court violates the First and Fourteenth Amendments to the United States Constitution and Article I, § 3 of the California Constitution pursuant to Title 42 Chapter 21 Subchapter I Sec. 1983.

The California Judiciary filed a notice of demurrer and demurrer on March 2, 2002, and Schmier opposed the demurrer. In California, a demurrer challenges the legal sufficiency of the complaint. On April 9, 2002, without appearance by the parties, the trial court adopted its tentative ruling and sustained the demurrer without leave to amend.

The trial court signed the Order Sustaining Demurrer on September 12, 2002, and the order was entered on September 17, 2002. Notice of Entry of Order Sustaining Demurrer was filed October 1, 2002.

The trial court entered the Order Dismissing Case on November 4, 2002. Notice of Entry of Order Dismissing Case was filed on December 20, 2002.

Appellant/Petitioner filed his Notice of Appeal Combined with Notice Designating Clerk's Transcript on December 23, 2002. As set forth in the Notice of Appeal, Schmier appealed the Order Dismissing Case entered on November 4, 2002, and the related Order Sustaining Demurrer entered on September 17, 2002.

Petitioner requested that the panel members of Division Five, First Appellate District, to which the appeal was assigned, recuse themselves because the action directly involved the conduct of that very panel in a prior appeal. The request was denied.

The parties briefed the appeal, and the appeal was submitted to the Court of Appeal without oral argument. The decision of the Court of Appeal herein affirming the trial court was filed on December 16, 2003, and it became final on January 15, 2004. No petition for rehearing was filed in the Court of Appeal.

Schmier filed a timely Petition for Review with the California Supreme Court on January 26, 2004. The California Supreme Court denied review on March 17, 2004.

This case presents important questions as to the scope and application of the First and Fourteenth Amendments to the United States Constitution to argument in the judiciaries across America.

B. Factual Background

Petitioner Kenneth J. Schmier is an attorney at law and member of the California State Bar. Schmier was counsel of record for plaintiff Michael Schmier in an action entitled *Michael Schmier v. Supreme Court of California*, San Francisco Superior Court No. 995232, Court of Appeal, First Appellate District No. AO85177 (hereafter "*Schmier I.*") Kenneth Schmier and Michael Schmier are brothers and are at the forefront of the nationwide effort to end no-citation rules[1]. *Schmier I* challenged the constitutionality of Rules 976 through 979 of the California Rules of Court.

Appearing as counsel of record before a panel of Division Five, First Appellate District, in *Schmier I*, Petitioner sought permission to cite unpublished appellate decisions with holdings directly relevant to the issues before the panel. Justice Barbara Jones, Presiding, expressly denied the request, relying on Rule 977, and the panel refused to permit Petitioner to cite or discuss unpublished decisions during his argument on behalf of his client. *Schmier I* thereafter resulted in a published decision, *Schmier v. Supreme Court of California*, 78 Cal. App. 4th 703 (2000), *rehearing denied*, March 2, 2000, *review denied*, May 24, 2000, *cert. denied*, 531 U.S. 958 (October 30, 2000). The *Schmier I* published decision affirmed the dismissal of the action, questioning the appellant's standing and also stating that Rules 976-979, which authorize California courts to designate some decisions as "published"

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[1] Young, Gary, "Rule Crusader; His Target: Court Opinions That Aren't Officially Published," *National Law Journal* (June 24, 2002).

and some as "unpublished," and, by implication, Rule 977, the no-citation rule, did not violate the Due Process or Equal Protection rights of litigants as a matter of law. The decision did not address the free speech issue.

Schmier took a second appeal (*Schmier II*) regarding denial of an award of attorney fees. The appeal was based upon language contained in the published decision of *Schmier I* in which the appellate court appeared to construe Rule 976 as mandating that decisions containing new law be published and to construe Rule 977 as allowing citation of unpublished decisions for any persuasive (but not precedential) value they might have[2]. Schmier argued the new constructions of Rules 976 and 977, and a resulting administrative decision of the California Judicial Council to publish unpublished decisions on the internet, achieved significant objectives of the litigation benefiting the people of California. The *Schmier I* panel heard the second appeal, but refused to consider any unpublished decisions of the same California Court of Appeal cited to it, and issued another published decision, i.e., *Schmier v. Supreme Court*, 96 Cal. App. 4th 873 (2002). The *Schmier II* published opinion held that Rules 976-979 do not require the publishing of any decision, even those establishing new law; that Rule 977 prohibits any citation of unpublished decisions for any purpose[3]; and that Petitioner's motion for appellate attorney fees should be denied.

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[2] Stephen R. Barnett, Scott Bennett, Maria Lin and Janet Tung, *New Day*, Daily Journal (Sept. 26, 2001).

[3] Other than the 977(b) exceptions.

During preparation of that appeal Petitioner determined his argument required the citation of unpublished decisions. Therefore, while *Schmier II* was pending, Petitioner filed the instant action (now Kenneth Schmier, rather than Michael Schmier, but herein called *Schmier III*), individually and as a private attorney general (CA Code Civ. Proc., § 1021.5), for declaratory and injunctive relief to enjoin respondents from enforcing rule 977 hoping that unpublished authorities to be cited to the *Schmier II* appellate court might not be rejected solely on the basis of Rule 977.

The trial court declined to issue a preliminary injunction and the *Schmier II* appellate court refused to consider any unpublished decisions brought to its attention, again solely on the basis of Rule 977. In the absence of the citation of these unpublished authorities, the appellate court denied the claims of Petitioner's clients and attorney fees to Petitioner.

In *Schmier III* petitioner also sought nominal damages as a result of being precluded from citing and discussing unpublished decisions at oral argument in *Schmier I*, as well as the refusal of the court to consider Petitioner's citation of unpublished decisions in *Schmier II*.

Petitioner contends that on its face and as applied, Rule 977 violates the constitutional rights to freedom of speech and to petition the government for redress of grievances. The California Judiciary demurred on the ground that the rule is valid and therefore Petitioner's complaint failed to state a cause of action. (CA Code Civ. Proc., § 430.10, subd. (e).) The trial court sustained the demurrer without leave to amend on the ground that rule

977 is not legally or constitutionally infirm, and ordered the case dismissed.

REASONS FOR GRANTING THE WRIT

The issue of validity of "no-citation" rules presented here poses a great controversy among and within judiciaries across America. The Judiciaries are divided[4]. Judges are offering reasons for no-citation rules that offend basic American expectations of appellate courts[5].

[4] 25 States And Four United States Courts Of Appeals Currently Retain No-Citation Rules. *See* Barnett, Stephen R., "No-Citation Rules Under Siege: A Battlefield Report and Analysis," *The Journal Of Appellate Practice And Process* (Fall 2003).

[5] "When the people making the sausage tell you it's not safe for human consumption, it seems strange indeed to have a committee in Washington tell people to go ahead and eat it anyway." The Advisory Committee Note observes that all manner of sources may be cited in court papers, including "opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles," and finds no persuasive reason to prohibit the citation of unpublished dispositions of the courts of appeals. Proposed Fed. R. App. P. 32.1 Advisory Committee Note, at 35 [hereinafter Advisory Committee Note]. Our judges, however, find very persuasive and obvious reasons for drawing that distinction: Shakespearian sonnets, advertising jingles and newspaper columns are not, and cannot be mistaken for, expressions of the law of the circuit. Thus, there is no risk that they will be given weight far disproportionate to their intrinsic value.

"Dispositions bearing the names of three court of appeals judges are very different in that regard. Published opinions set the law of the circuit, and even unpublished dispositions tend to be viewed with fear and awe, simply because they, too, appear to have been written (but most likely were not) by three circuit judges." Judge Alex Kozinski, *Letter to 3rd Circuit Judge Samuel Alito, Jr. in opposition to Proposed FRAP 32.1.*

The Department of Justice has suggested to the Appellate Rules Committee the importance of having the United States Supreme Court resolve this issue[6], and moved the adoption of FRAP 32.1. The Appellate Rules Committee voted 7-1 to endorse FRAP 32.1, which would eliminate no-citation rules in the federal courts, expressly finding no-citation rules "difficult to justify"[7] and "wrong as a policy matter."[8] Nevertheless a minority of federal judges has announced a determination to derail the proposed

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[6] "MR. LETTER: Judge Walker, just one question. Given that there are clearly widely varying and strong views on this, wouldn't it make sense for us as a committee . . . to send this up the line so that frankly the Supreme Court is the one who makes the decision, rather than us? Because it may very well be that many of us agree with you on local option but nevertheless understand that many disagree.

"So again shouldn't this be passed up so that this, since this is so controversial and apparently difficult, shouldn't the Supreme Court make that decision rather than this committee?" Transcript Administrative Offices Of The U.S. Courts, Advisory Committee On Appellate Rules, Tuesday, April 13, 2004, Page 195.

[7] "There is no compelling reason to treat non-precedential opinions differently. It is difficult to justify a system under which the non-precedential opinions of the D.C. Circuit can be cited to the Seventh Circuit, but the non-precedential opinions of the Seventh Circuit cannot be cited to the Seventh Circuit. *See* D.C. Cir. R. 28(c)(1)(B); 7th Cir. R. 53(b)(2)(iv) & (e)." Proposed Fed. R. App. P. 32.1 Advisory Committee Note.

[8] The advisory Committee believes that restrictions on the citation of "unpublished" or "non-precedential" opinions the violations of which can lead to sanctions or to formal charges of unethical conduct are wrong as a policy matter. Report of Advisory Committee on Appellate Rules From Judge Samuel A. Alito, Jr., Chair to Judge Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure (May 22, 2003).

rule[9]. Settlement of this issue is necessary to curtail an unending and unseemly public controversy within the judiciaries across America.

Presumably the issue will come before the Supreme Court during the administrative approval process of FRAP 32.1, but that administrative process will do nothing to restore Petitioner's rights in California. The United States Supreme Court is the only Court to which Petitioner may turn for an unbiased hearing. The panel of the California Court of Appeal to which this matter was assigned was the very panel that denied petitioner opportunity to cite unpublished appellate decisions. The California Supreme Court itself promulgated Rule 977, and its members have privately lobbied against both proposed FRAP 32.1[10] and California Legislative bills proposed to eliminate the no-citation rule[11]. Respondents and the California Attorney General have warned the legislature that an attempt to legislatively address this issue would violate the separation of powers doctrine[12]. The Ninth Circuit has publicly announced that a majority of its judges oppose the elimination

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[9] Ward, Stephanie F., "Giving Their Opinions; Committee Backs Rule Allowing Lawyers to Cite Unpublished Decisions," *ABA Journal eReport* (April 23, 2004).

[10] Letter of Chief Justice Ronald M. George to the Appellate Rules Committee. http://www.secretjustice.org/pdf_files/Comments/03-AP-471.pdf

[11] *See* Rappattoni, Linda, "Bill on Unpublished Opinions Dropped: Chief Justice agrees to study how the rules are applied, but remains opposed to such rules," Daily Journal (April 26, 2004).

[12] Committee Report Assembly Committee On Judiciary, AB 2404 February 24, 2000. Whether such an enactment would violate that doctrine is irrelevant, because Respondent would have the final say.

of no-citation rules and mounted a letter writing campaign to that effect[13].

Apparently there are judges across America that need to be reminded that courtrooms are forums procedurally structured for open and free debate, and that there is a warranty of judicial determination: that law to be good enough for one must be good enough for all.

ARGUMENT

Petitioner does not challenge the constitutionality of a court's ability to publish cases selectively, or the power of a court to select from precedents properly presented to it or known by it, those precedents it finds apposite within the context of a particular case. Petitioner challenges only the California Judiciary's ability to enforce an unconstitutional content based prior restraint of counsel's spoken and written argument, the effect of which is to allow the California Judiciary selectively and arbitrarily to negate all prospective authority of appellate decisions outside of the context of determining cases or controversies[14], and defeat entirely the many salutary effects of the flexible but fundamental concept of *stare decisis*.

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[13] Judge Alex Kozinski, *Letter to 3rd Circuit Judge Samuel Alito, Jr. in opposition to Proposed FRAP 32.1.*

[14] Selective prospectivity is unconstitutional. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *Griffith v. Kentucky*, 479 U.S. 314 (1987).

The California Constitution requires all appellate court decisions to be in writing with reasons stated[15]. There is no California statute or other rule of any kind that negates the precedential authority of appellate court decisions on the basis of being designated "Not to Be Published" rather than "To Be Published". To the contrary, California law requires all inferior tribunals to follow the *decisions* of the California Court of Appeal[16]. Nevertheless, Respondents have declared 94% of these same decisions of the California Court of Appeal to be illegal to mention in court argument. This "no-citation" rule has the effect of making almost all appellate decisions nullities to the law, despite that a large proportion of these appellate decisions determine matters of first impression. Petitioner sought to use this body of legal thinking to argue to the court that vast numbers of decisions resolving matters of first impression significant to the community were being resolved in uncitable opinions leaving the state without benefit of law or even guidance on each of the many issues considered, and that the appellate court was required by law to consider those opinions. By Rule 977, Petitioner, and all other litigants, have been denied the only tool with which powerless litigants can petition infinitely powerful judiciaries to award equal protection – to argue in the manner of Mark Anthony, "You yourself embraced the logic I argue to you, what has changed that you now refuse to honor that same logic?"

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[15] California Constitution, Article VI, § 14.

[16] *Auto Equity Sales v. Superior Court*, 57 Cal.2d 450 (1962).

Petitioner suggests that the California appellate court erred in its assertion that freedom of speech can be so circumscribed in judicial forums that litigants may be forbidden to tell judges – government officials – how they have treated others similarly situated for no other reason than that the court's decisions have been marked "Not For Publication."

Rule 977, on its face and as it has been applied to Petitioner, has violated his free speech rights guaranteed by the First Amendment to the United States Constitution and Article I, § 3 of the California Constitution.

The broad sweep of Rule 977 is a prior restraint interfering with free speech. It is viewpoint-based because it bans the viewpoint of the judiciary, our law. It is also content-based because it both bans mention of the true attribution of court-reasoning to appellate judges which makes that court-reasoning law, and because it makes unmentionable content necessary to litigants to argue for equal protection. As a prior restraint, Rule 977 is presumptively invalid, and the burden of justifying such a rule should have fallen to the California Judiciary.

Even if justification were offered and proven, Rule 977 would still be overbroad. For where is the judge who would feel comfortable preventing a criminal defendant from citing to his or her court unpublished cases that would, or even might, exonerate that defendant? Wouldn't that judge feel his or her court had violated basic American values[17]?

[17] A presumption that courts will waive Rule 977 to allow citation in such instances only deprives opponents of the rule of compelling fact

(Continued on following page)

Rule 977 is overbroad because it invokes no standards in its application, allowing judges to arbitrarily consign vast numbers of decisions of first impression to the dustbins of history by making nearly all of California's judicial precedent unmentionable, unknowable and unmemorable to a judiciary that expressly depends upon it for the proper exercise of its judicial power.

Respondents have not permitted Rule 977 to be subject to constitutional scrutiny of any kind, and it cannot be declared a constitutional exercise of legitimate judicial authority on demurrer.

A. THE COURT OF APPEAL DECISION IS INCONSISTENT WITH THE HOLDING OF THE U.S. SUPREME COURT IN *LEGAL SERVICES CORP. V. VELAZQUEZ.*

Reference to the prior decisions of courts of appeal is the essence of common law argument, and is an exercise of speech and expression upon which common law courts must depend for the proper exercise of judicial power.

Legal Services Corp. v. Velazquez, 121 S.Ct. 1043, 531 U.S. 533, 149 L. Ed. 2d 63 (2001), calls into question the constitutionality of any law that restricts the arguments that lawyers may pursue:

> By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits

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situations to challenge it, it does not eliminate the chilling effect on legal argument and *stare decisis*.

> speech and expression upon which courts must depend for the proper exercise of the judicial power. . . . [¶.] The restriction imposed by the statute here threatens severe impairments of the judicial function. Section 504(a)(16) sifts out cases presenting constitutional challenges in order to insulate the Government's laws from judicial inquiry. If the restriction on speech and legal advice were to stand, the result would be two tiers of cases. In cases where LSC counsel were attorneys of record, there would be lingering doubt whether the truncated representation had resulted in complete analysis of the case, full advice to the client, and proper presentation to the court. The courts and public would come to question the adequacy and fairness of professional representations when the attorney, either consciously to comply with this statute or unconsciously to continue the representation despite the statute, avoided all references to questions of statutory validity and constitutional authority. A scheme so inconsistent with accepted separation of powers principles is an insufficient basis to sustain or uphold the restriction on speech. It is no answer to say that the restriction on speech is harmless because, under LSC's interpretation of the Act, its attorneys can withdraw. This misses the point. *The statute is an attempt to draw lines around the LSC program to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider.*

Velazquez, 121 S.Ct. at 1050-51 (italics added).

Multiple commentators have recognized that the *Velazquez* holding applies to no-citation rules for the same reasons enumerated by the Supreme Court. *See, e.g.,*

Barnett, Stephen R., "From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules," *Journal of Appellate Practice and Process* (Spring 2002); Tusk, Maria Brook, "No-Citation Rules As A Prior Restraint on Attorney Speech," 103 Colum. Law Rev. 1202 (June 2003).) Others have strongly made the argument that no-citation rules violate free speech. (*See, e.g.,* Katsh and Chachkes, "Examining the Constitutionality of No-Citation Rules," *New York Law Journal* (April 2, 2001).)

Rule 977 truncates presentation to the courts in the same way as the law this Court struck down in *Velazquez*. The California Court of Appeal incorrectly distinguished *Velazquez*, and the resulting decision is inconsistent with the opinion of the Supreme Court.

First, the California Court of Appeal finds Rule 977 different from the Act considered in *Velazquez* because Rule 977 is, according to it, viewpoint-neutral. The Court of Appeal is incorrect. Rule 977 eliminates from discussion perhaps the most important viewpoint of all – the Judiciary's viewpoint as expressed in its own prior appellate decisions.

Moreover, even if Rule 977 *is* viewpoint-neutral, it certainly is not content-neutral because it prohibits attribution of judicial reasoning to its authors. The rule, by its clear language, identifies particular content of speech and prohibits that content. Both content-based *and* viewpoint-based restrictions are presumptively invalid. *See Hill v. Colorado*, 530 U.S. 703, 769 (2000) (Kennedy, J., dissenting on other grounds).

Second, the Court of Appeal finds that Rule 977 does not operate to preclude any attorney from presenting any argument to the court. Says the Court of Appeal, "a

contention that rests on the reasoning of an unpublished decision may be asserted in a party's brief or argued in court." While a litigant may use the analysis set forth in an unpublished decision and present that analysis as the later litigant's own argument, the litigant is unquestionably restrained from truthfully *attributing* that argument to the judiciary from which it came, depriving the argument of the imprimatur and authority derived from the logic that the court itself *must* have regarded the argument as law if it used such an argument to affect another litigant. In requiring the Appellate Courts of California to resolve matters in "writing with reasons stated,"[18] the people intended that prospectivity born of citation would be a meaningful discipline on the decision of cases[19].

There can be no doubt that in a common law system, arguments attributed to courts have far more credibility than those innovated by parties. This is certain in California because California law jurisdictionally binds California judges to follow decisions of higher courts without regard to whether they come from published or unpublished decisions.

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[18] California Constitution, Article VI, § 14.

[19] "Undoubtedly [the requirement of a written opinion] will insure a careful examination of the cases, and result in well considered opinions, because they must come before the jurists of the country and be subjected to the severest criticism. . . . It tends to purity and honesty in the administration of justice." Delegate Wilson during the 1878-1879 California Constitutional Convention. 2 Willis & Stockton, *Debates and Proceedings of the Constitutional Convention of the State of California* (1880) at p. 951, col. 1, *see Powers v. City of Richmond*, 10 Cal. 4th 85, 142 (1995) (Lucas, C.J., Dissenting).

In *Auto Equity Sales v. Superior Court*, 57 Cal. 2d 450 (1962), the California Supreme Court held:

> *Decisions of every division of the District Courts of Appeal are binding* upon all the justice and municipal courts and upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction.

Id. at 455-56 (italics added.)

California courts have noted that Rule 977 as applied by the Appellate Court and *Auto Equity Sales* are in a direct conflict.

> [A] fair reading of Rule 977 of the California Rules of Court surely allows citation to the unpublished opinion. To hold otherwise leaves us in the Orwellian situation where the Court of Appeal opinion binds us, under *Auto Equity Sales v. Superior Court*, 57 Cal.2d 450, 20 Cal.Rptr.321, 369 P.2d 937 (1962), but we cannot tell anyone about it. Such a rule of law is intolerable in a society whose government decisions are supposed to be free and open and whose legal system is founded on principles of the common law (CA Civ. Code, § 22.2) with its elementary reliance on the doctrine of *stare decisis*.

County of Los Angeles v. Wilshire Ins. Co., 103 Cal. App. 3d Supp. 1, 3 (1978) (Presiding Judge Cole, Concurring.)

With respect to its own *Auto Equity Sales,* how can the California Judiciary possibly assert that Rule 977 serves any legitimate purpose? The California Judiciary has answered only with silence.

Additionally, by purportedly requiring litigants to argue the rationale of an unpublished decision without revealing the prior court's authorship and holding, Rule 977 allows some parties to argue cases with which a particular judge or panel is familiar to the disadvantage of parties that may not know the case. Rule 977 thus does not limit the cases that must be read, rather it results in a system in which all litigants, and perhaps even courts, must search *all* cases, both "published" and "unpublished" alike, to be aware of subtle references, a task infinitely more burdensome than simply responding to a stated citation. Undeniably, judges and their law clerks are now reading unpublished decisions regularly appearing in modern computer research. Given the likelihood that all parties, and the court, will know of relevant unpublished decisions, Rule 977 requires courts to be forums where case content is discussed in a manner that avoids citation for no purpose other than to comply with Rule 977.

What rational purpose is served by such a limitation on speech? The California Judiciary answers only with silence.

After its discussion of the *Velazquez* decision, the Court of Appeal side-steps the implications of *Velazquez* by stating that "whatever right to 'free speech' an attorney has [in the courtroom] is extremely circumscribed," and then concludes without further explanation, "the 'no-citation' rule does not encroach on this 'extremely circumscribed' right."

The Court of Appeal thus implicitly admits that Rule 977 *does* invade the area of free expression, a fact that cannot be credibly disputed. Because such a limitation is presumptively invalid, the California Judiciary must

justify this invasion with evidence and logic, and it offers only silence.

B. ADJUDICATION OF THE CONSTITUTIONALITY OF RULE 977 CANNOT BE ACCOMPLISHED ON THE FACE OF THE COMPLAINT.

The California Court of Appeal below also distinguishes *Velazquez* on the purported grounds that no separation of powers issue exists in the Rule 977 analysis as it did in *Velazquez*[20]. The existence of an issue of separation of powers is beside the point. In *Velazquez*, this Court did not say that a statute restricting speech may only be invalidated if it constitutes a violation of the separation of powers doctrine. The Court discussed the proffered rational, or "governmental interest," that Congress wanted certain provisions removed from the purview of courts, and held that such a rationale was insufficient to justify the restriction of speech.

Here the purported governmental interest advanced by Rule 977 is entirely unknown, unproven and impugned by *Auto Equity Sales*, 57 Cal. 4th at 455-56. It was not before the Court of Appeal below, and it was not before the trial court. A finding of the constitutionality of Rule 977 on

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[20] A separation of powers issue does exist. Rule 977 enables the California Judiciary to nullify precedent outside of the decision of a case or controversy. The power to change law outside of a case or controversy is legislative. A monster with two faces results. The judiciary may make law for one without making law for all, and due to its "depublication" practice it also allows the changing of the law for all without changing the law for the burdened litigant. What remains of the rule of law in the presence of this monster?

demurrer is not possible because no evidence has been submitted or discovered regarding any justification of Rule 977, possible lesser intrusive means of achieving the same result, or other factual information necessary for any level of scrutiny to be applied

CONCLUSION

California case law is replete with examples of situations in which government bureaucracies are forced to justify restrictions on free expression. The California Judiciary has been hypocritically unwilling to submit its own restriction to the same level of scrutiny it applies every day to other governmental institutions. To avoid such scrutiny the Respondent has taken liberties with judicial processes that it would not allow other litigants.

The California Judiciary approved the constitutional legitimacy of the administrative judicial enactment Rule 977 without any scrutiny whatsoever. The decision of the Court of Appeal is contrary to the law, contrary to common sense, and contrary to the public trust imposed in Respondents.

Only the United States Supreme Court can set this right. Therefore, Petitioner respectfully requests that the Court grant review; permit full detailed briefing on the questions outlined in this Petition and analysis of the effects of no-citation rules on accountability of the judicial process, on compromise of the nervous system of democratic government process, and on corrosion of the rule of law; require the California Judiciary to answer all legitimate issues raised; and in due course reverse the order of

the trial court and remand the action to the trial court for further litigation on the merits.

Respectfully submitted,

Date: June 14, 2004

KENNETH J. SCHMIER
Petitioner

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SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE CITY AND COUNTY OF SAN FRANCISCO UNLIMITED JURISDICTION

KENNETH J. SCHMIER, Plaintiff/Petitioner, v. SUPREME COURT OF CALIFORNIA, CALIFORNIA COURTS OF APPEAL, and CALIFORNIA JUDICIAL COUNCIL, Defendants/Respondents.	CASE NO. CGC-02-403800 **ORDER SUSTAINING DEMURRER** Date: April 9, 2002 Time: 9:30 a.m. Dept.: 302 Hon. A. James Robertson II (Filed Sep. 17, 2002)

The demurrer of Respondents Supreme Court of California, California Court of Appeal, and Judicial Council of California to the Complaint for Declaratory and Injunctive Relief filed by plaintiff/petitioner Kenneth J. Schmier came on regularly to be heard by the court on April 9, 2002 and was submitted on the tentative ruling. There were no appearances by counsel.

The court having read and considered the supporting and opposing points and authorities submitted by counsel, and good cause appearing therefore,

IT IS ORDERED that the demurrer be, and hereby is, sustained without leave to amend on the ground that the Complaint for Declaratory and Injunctive Relief does not state facts sufficient to constitute a cause of action in that Rule 977, California Rules of Court, is not legally or Constitutionally infirm.

Dated: Sep 12, 2002, 2002

/s/ A. JAMES ROBERTSON, II
A. James Robertson II
Judge of the Superior Court

Approved as to form only: /s/ Kenneth J. Schmier
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SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE CITY AND COUNTY OF SAN FRANCISCO UNLIMITED JURISDICTION

KENNETH J. SCHMIER, Plaintiff/Petitioner, v. SUPREME COURT OF CALIFORNIA, CALIFORNIA COURTS OF APPEAL, and CALIFORNIA JUDICIAL COUNCIL, Defendants/Respondents.	CASE NO. CGC-02-403800 **[~~Proposed~~ /s/CL]** **ORDER** **DISMISSING CASE** Case Management Conf: Dec. 20, 2002 (Filed Nov. 4, 2002)

The demurrer of respondents Supreme Court of California, California Court of Appeal, and Judicial Council of California to the Complaint for Declaratory and Injunctive Relief brought by plaintiff/petitioner Kenneth J. Schmier came on regularly for hearing by the Court on April 9, 2002. There were no appearances by counsel.

Sustaining the tentative ruling, the Court sustained the demurrer without leave to amend. The Court's Order sustaining the demurrer was entered on October 1, 2002.

WHEREFORE, THE COURT ORDERS that this action be dismissed and that all further appearances be taken off calendar.

Dated: Oct. 31, 2002, 2002

/s/ A. James Robertson II
A. James Robertson II
Judge of the Superior Court

Approved as to form only:

/s/ Kenneth J. Schmier
Kenneth J. Schmier
Attorney/Petitioner in *Pro Per*

Filed 12/16/03
Schmier v. The Supreme Court of California CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

KENNETH J. SCHMIER, **Plaintiff and Appellant,** **v.** **THE SUPREME COURT OF CALIFORNIA, et al.,** **Defendants and Respondents.**	**A101206** **(San Francisco County Super. Ct. No. CGC-02-403800)**

Kenneth J. Schmier appeals the dismissal of his complaint for declaratory and injunctive relief after the demurrer of respondents, the Supreme Court of California, the Court of Appeal of California and the Judicial Council of California, was sustained without leave to amend. Appellant seeks a declaration that California Rules of Court, rule 977, governing the citation of unpublished

opinions, is unconstitutional and seeks to enjoin respondents from enforcing rule 977.[1] We affirm.

BACKGROUND

Rules 976 through 979 govern the publication of opinions. Stated simply, rule 976(b) provides that no opinion of the Court of Appeal may be published in the Official Reports unless it establishes a new rule of law, resolves a conflict in the law, presents an issue of continuing legal interest, or reviews the history of a common law rule or statute. Rule 978 establishes the procedure for requesting publication of appellate opinions. Rule 979 establishes a similar procedure for requesting depublication of appellate opinions.

Rule 977 (the "no-citation" rule), at issue in this appeal, provides in relevant part:

"(a) An opinion of a Court of appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

"(b) Such an opinion may be cited or relied on:

"(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

"(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reason

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[1] All rule references are to the California Rules of Court.

for a decision affecting the same defendant or respondent in another such action or proceeding."

This is appellant's third appeal on behalf of himself or as counsel for his brother, Michael Schmier (Schmier), challenging rules 976 through 979. In the first appeal, *Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703 (*Schmier I*), Schmier contended that these rules violate the federal and state constitutional separation of powers doctrine and the constitutional rights to freedom of speech, to petition the government for redress of grievances, to due process and to equal protection. He also contended that these rules conflict with Civil Code section 22.2 and the doctrine of stare decisis. (*Schmier I*, at pp. 706-707.) This court affirmed the dismissal of Schmier's action, which sought injunctive relief and a writ of mandate to compel respondents to publish all appellate opinions and to permanently enjoin them from enforcing rules 976 through 977. (*Schmier I*, at pp. 707, 712.) "The rules were established by persons in possession of a public office with authority to do so, and they comport with applicable statutory and constitutional requirements." (*Id.* at p. 712.) The California Supreme Court denied Schmier's petition for review.

In the second appeal, *Schmier v. Supreme Court* (2002) 96 Cal.App.4th 873, (*Schmier II*), Schmier alleged he was entitled to attorney fees for *Schmier I*, under the private attorney general doctrine (Code Civ. Proc., § 1021.5), though he had not prevailed, because the case conferred a significant benefit on the public by restricting the discretion of the Courts of Appeal to publish or not publish appellate opinions. The court rejected that contention and affirmed. (*Schmier II*, at pp. 876, 878-880, 882-883.)

While *Schmier II* was pending, appellant filed the instant action, individually and as a private attorney general (Code Civ. Proc., § 1021.5), for declaratory and injunctive relief to permanently enjoin respondents from enforcing rule 977. He also sought nominal damages as a result of being precluded from citing and discussing unpublished opinions at oral argument in *Schmier I*, and the refusal of this court to consider appellant's citation of unpublished opinions in his written briefs in *Schmier II*. Appellant contends that on its face and as applied, rule 977 violates the constitutional rights to freedom of speech and to petition the government for redress of grievances. Respondents demurred on the ground that the rule is valid and therefore appellant's complaint failed to state a cause of action. (Code Civ. Proc., § 430.10, subd. (e)(.) The trial court sustained the demurrer without leave to amend on the ground that rule 977 "is not legally or constitutionally infirm," and ordered the case dismissed.

DISCUSSION

A demurrer admits the truth of all material factual allegations, and we are required to accept them as such, together with those matters subject to judicial notice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We review the judgment of dismissal de novo, and exercise our independent judgment as to whether the complaint states a cause of action. (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501.)

In *Schmier I*, this court held that the challenged rules did not violate the First Amendment. Appellant argues that a post-*Schmier I* decision by the United States Supreme Court should lead to a reevaluation of that issue. In

Legal Services Corp. v. Velazquez (2001) 531 U.S. 533, the court considered a challenge to the Legal Services Corporation (LSC) funding provision. That provision permitted LSC lawyers to represent clients challenging the level of welfare benefits they received, but precluded the lawyers from arguing that any applicable state statute conflicts with a federal statute or that either the state or federal statute violates the United States Constitution. Over a strong dissent, the high court ruled that the challenged provision was a viewpoint-based discrimination that violated the First Amendment. (*Legal Services Corp.* at pp. 536-537.) "By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. (*Id.* at p. 545.) "A scheme so inconsistent with accepted separation-of-powers principles is an insufficient basis to sustain or uphold the restriction on speech." (*Id.* at p. 546.)

Legal Services Corp. v. Velasquez is inapposite. First, the "no-citation" rule does not discriminate between competing viewpoints. No unpublished case may be cited regardless of its position on any particular issue. Second, counsel is not precluded from advancing any argument to a court. In fact, a contention that rests on the reasoning of an unpublished decision may be asserted in a party's brief or argued in court. The party may not, however, reference the unpublished decision adopting the argument. Third, no separation of powers issue exists; the sole limitation is self-imposed by the judiciary.

In a decision that focused on the First Amendment implications of disciplining a lawyer for comments about a pending case made outside the courtroom, the high court

stated that "in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." (*Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1071.) As we concluded in *Schmier I*, the "no-citation" rule does not encroach on this "extremely circumscribed" right.

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

STEVENS, J.

Court of Appeal, First Appellate District,
Division Five –No. A101206
S122281

IN THE SUPREME COURT OF CALIFORNIA

En Banc

KENNETH J. SCHMIER, Plaintiff and Appellant,

v.

THE SUPREME COURT OF CALIFORNIA et al.,
Defendants and Respondents.

(Filed Mar. 17, 2004)

Petition for review DENIED.

GEORGE
Chief Justice